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(61)

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

APPELLANT/ ACCUSED (In custody) — Smt. Shail Sahu, aged 22 years, Wife of Omnath Sahu, resident of village Suhela, P.S. Suhela, Baloda Bazar, Dist. Raipur (CG).

-Versus-

RESPONDENT — State of Chhattisgarh, Through P.S. Suhela, Distt. Raipur (CG).

(Appeal under Section 374(2) of the Cr.P.C.)

Division Bench :

Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ

27-8-2007

Shri Yogeshwar Sharma, counsel for the appellant.

Shri Vinay Harit, Dy. Advocate General for the State.

Heard.

Oral judgment dictated on *dias*.

L.C. Bhadoo, J

The accused/appellant has preferred this appeal against the judgment of conviction and order of sentence dated 21-4-2001 passed by Second Additional Sessions Judge, Baloda Bazar, District Raipur, in Sessions Trial No.245/2000 whereby she has been held guilty under Section 302 of the Indian Penal Code for committing murder of Ku. Bharati and sentenced her to undergo imprisonment for life & to pay a fine of Rs.1,500/-, in default of payment of fine to further undergo R.I. for one year.

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2) The case of the prosecution, in brief, is that PW-2 Kamta Prasad Sahu, uncle of the deceased, gave merg intimation (Ex.P/3) to Police Station Suhela on 11-4-2000 at about 7.40 p.m. to the effect that today at about 2.00 p.m. after taking meal he went towards timber house (*wood tol*) from where at about 5.00 p.m. he was returning on the way he saw that his brother Omnath was standing near the clinic of Dr. Tilak keeping his daughter Bharati, aged about 4 years in his lap. Dr. Tilak examined Bharati and said that she is already dead. Therefore, they brought her to their residence. Enquiries were made from accused i.e. Shail, second wife of Omnath and the step mother of Bharati. She disclosed that Bharati was sleeping in her bed room, she woke-up to urinate and thereafter she went to another room for sleeping at about 2.30 to 3.00 p.m. When she went towards the room where Bharati was sleeping, she saw that she was lying on the ground and she saw the injuries on her body. Receiving this report, the Investigating Officer left for scene of occurrence. After giving notice (Ex.P/6) to the Panchas, inquest (Ex.P/7) was prepared on the body of Bharati. Pieces of nails of Bharati were seized under Ex.P/8. Pieces of nails of accused Shail were seized under Ex.P/9. Body of Bharati was sent for postmortem examination to the Primary Health Centre, Suhela where Dr. A.K. Soni, conducted postmortem and prepared report (Ex.P/1). He opined that the cause of death was asphyxia due to strangulation. Injuries were ante mortem in nature. Death was homicidal in nature. Based on that First Information Report (Ex.P14) was registered. Site plan (Ex.P/15) was prepared. In the police custody, accused gave memorandum (Ex.P/10) regarding the place where she kept the towel, which was used for strangulation. In pursuance of that she got recovered the towel under Ex.P/11 from her bed room. Patwari prepared the site plan under Ex.P/12. Bed sheet was seized under Ex.P/16. The seized

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articles were sent to Forensic Science Laboratory, Raipur under Ex.P/16A from where report Ex.P/19 was received.

3) After completion of investigation, charge sheet was filed in the Court of Additional Chief Judicial Magistrate, Baloda Bazar, who in turn committed the case to the Court of Sessions Judge, Raipur, from where learned Second Additional Sessions Judge, Baloda Bazar, received the same on transfer for trial.

4) In order to establish the charge against the accused/appellant, the prosecution examined 12 witnesses. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure in which she denied the material appearing against her in the prosecution evidence. She stated that she is innocent and has been falsely implicated. She examined one defence witness namely, Daman Lal Sahu (DW-1), who has stated that in the election Omnath, husband of the accused was opposing Niranjan Verma, Sarpanch and Dhanwar was supporter of Niranjan Verma.

5) Learned Additional Sessions Judge after hearing counsel for the respective parties, convicted and sentenced the accused/appellant as aforementioned.

6) We have heard Shri Yogeshwar Sharma, learned counsel for the appellant and Shri Vinay Harit, Dy. Advocate General for the State.

7) Learned counsel for the appellant has not disputed the homicidal death of Ku. Bharati. Moreover, PW-1 Dr. A.K. Soni has stated that on 12-4-2000 he conducted postmortem on the body of Ku. Bharati. He stated that the tongue of the deceased was between the teeth. Eyes were closed. Conjunctiva was

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congested. Fluid mixed with blood was coming out from the mouth and nose. There was a ligature mark around the neck and there were following injuries :

i) Abrasion in the size of 3 x ½ cm. on left side of neck just above the ligature mark.

(ii) Abrasion in the size of 7 x ½ cm. oblique on right side of neck just below the ligature mark.

(iii) Abrasion in the size of 3 x ½ cm. on the right supra clavicular region.

(iv) Abrasion in the size of 8 x ½ cm. on left shoulder.

(v) Abrasion in the size of 2 x 1 cm. on pubic region.

(vi) Multiple abrasion on medial aspect of the right thigh.

(vii) Multiple abrasion on anterior and medial aspect of the left thigh.

In the opinion of the Doctor, cause of death was asphyxia as a result of strangulation. Postmortem report is Ex.P/1. In view of the above evidence based on the postmortem report, it is established that death of Ku. Bharti was homicidal in nature.

8) As far as complicity of the accused in the crime in question is concerned, there is no direct or ocular evidence in this case. The case rests on the circumstantial evidence and as per the settled law in order to convict an accused based on the circumstantial evidence, the Hon'ble Apex Court in the matter of **Dhananjoy Chatterjee Vs. State of W.B.**[1] held that :

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is

[1] (1994) 2 SCC 220

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to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

9) In the present case the prosecution has tried to establish the charge against the accused based on the following circumstances namely :

(i) That, the accused made extra judicial confession.

(ii) That, the deceased was last seen with the accused when she was alive just before her death.

10) As far as first circumstance with regard to extra judicial confession is concerned, PW-7 Ripusudan Verma has stated that Police came in the village and enquired from Shail (accused) in their presence. Shail disclosed that she gagged cloth in the mouth of Ku. Bharati, but she did not disclose where she kept the cloth. Memorandum (Ex.P/10) bears his signature. Police seized the cloth from the house of Omnath under Ex.P/11. They had not enquired anything from the accused. Only police enquired and Shail did not disclose anything in their presence. Therefore, the evidence of this witness regarding the Extra Judicial Confession is of no use.

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11) Even, PW-10 Omnath, father of the deceased and husband of the accused, has stated that on the fateful day he went to village Bhatbhera, from where he returned and went to Bilaspur at about 1.00 p.m. Santhosh Naik telephoned him about the death of his daughter. Therefore, he came to Suhela on a motorcycle. On that day, there were two marriages in his house. One marriage was of Dhaleshwari and second marriage was in his brother's house namely Romnath. The deceased used to reside with him along with his wife. There were injuries on the person of Ku. Bharati. He enquired from his wife Shail about the cause of death of Ku. Bharati. She disclosed that she went on the ground floor for work and Dhaleshwari called her and disclosed that she saw that Ku. Bharati was lying on the floor, there was no movement in her body and Shail disclosed nothing to him. This witness was declared hostile and he has not stated that the accused made extra judicial confession in his presence.

12) Other witness relating to extra judicial confession i.e. PW-6 Niranjan, Sarpanch of the village, has stated that inquest (Ex.P/7) on the body of Ku. Bharati was prepared in his presence. There were injuries on her body. On enquiry, Shail disclosed that she called Ku. Bharati on the pretext that she will give her chocolate, switched on cooler & fan and thereafter she pressed her nose. For some time she let off Ku. Bharati and after some time she gagged the towel in her mouth and pressed the neck. In the cross-examination, this witness has stated that he is a village Sarpanch. The incident took place on 11th. They enquired from the accused on the next day of the incident i.e. 12th or 13th at about 5.00 p.m. to 6.00 p.m. in the evening. On cross-examination, he has denied that Police recorded his statement on 16-4-2000. It is not like that after 4 days of the incident i.e. 14-4-2000, he, Santosh, Thanvar enquired from Shail. They did not enquire from Shail on that day at 10.00 a.m. Again he has

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stated that in the night of the incident thousands of the persons had gathered at the place of occurrence. In the night itself, they asked the accused about the incident because they were suspecting her to be the culprit as she was stepmother of Ku. Bharati as such, she must have committed the murder. It is true that in the night of the incident itself one or two policemen reached on the scene. When they enquired from the accused about her involvement in the crime, police personal were not there. It is correct to say that all the villagers started saying that the accused is the stepmother of the deceased; therefore, she must have committed the murder. It is correct to say that till the next day of incident they were not able to know that who has committed the crime. Before the incident, he had no occasion to talk to Shail, for the first time in the evening of the day of incident; he had a talk with the accused. After cremation, enquiries were made from the accused. At that time, Omnath was also present. Therefore, as per the evidence of this witness, about six persons had enquired and the husband of the accused was also present, whereas the husband (Omnath) has not supported the case of the prosecution that Shail had made any extra judicial confession. From the evidence of this witness two things emerges i.e. (i) they started enquiring from the accused in the evening of the same day and, (ii) he has said in a definite term that the enquiries were made from the accused either on 12th or 13th evening. He has further stated that all the villagers were suspecting the accused as culprit being the stepmother of the deceased and that is why the villagers said to her that she has committed the murder.

13) On the other hand, PW-9 Thanvar Singh, before whom the extra judicial confession said to have been made, has stated that after 2-3 days of the incident he along with Niranjan, Ripusudan, Santosh & Dilip went to the house

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of the accused and asked her to tell what is the correct thing, on which Shail disclosed that she has committed the murder because Dhaleshwari was being married, therefore, she wanted to stop that marriage that is why she committed the murder of Ku. Bharati. The accused also disclosed that she called Ku. Bharati on the first floor on the pretext that she will give chocolate to her thereafter she pressed her nose, on which the deceased said that what she is doing, therefore, she let off her for some time. Thereafter she thought that she will disclose this fact to the elder mother, therefore, she gagged a towel in her moth and pressed her neck. In the cross-examination, this witness has stated that at that time Ripusudan was not there. They went on 16-4-2000 for enquiry at about 4.00 to 5.00 p.m. At that time, Omnath, husband of the accused, was also present there. On 14-4-2000 at about 10.00 a.m. Sarpanch Niranjan, Santosh & Dilip had not gone to the house of the accused for enquiry from her. He did not disclose to the Police that on 14-4-2000 at about 10.00 a.m. Niranjan, Ripusudan, Santosh & Dilip went to the house of Omnath. He has further stated that from the day of the incident the villagers were saying to the accused, as she is the stepmother of the deceased, therefore, she has committed the murder. Specific question was put to this witness that he has stated that extra judicial confession was made 2-3 days after the incident and he has also stated that accused made extra judicial confession on 16-4-2000, out of these two statements which one is correct, on this, the witness after thinking for some time stated that extra judicial confession was made on 16-4-2000. Therefore, the evidence of PW-9 Thanvar Singh & PW-6 Niranjan regarding extra judicial confession is contradictory. Niranjan has stated that extra judicial confession was made either on 12th or 13th whereas Thanvar has stated that extra judicial confession was made on 16-4-2000. Therefore, their

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evidence regarding extra judicial confession does not inspire confidence of the Court.

14) Moreover, it is settled law that in order to place explicit reliance on the extra judicial confession it must be voluntary, true & prompt and the witnesses before whom the extra judicial confession said to have been made must be unbiased, not even remotely inimical to accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, words spoken are clear, and unmistakably that the accused is the offender and nothing is omitted by the witness which may militate against it, after subjecting the evidence to rigorous test on the touchstone of credibility, if it passed the test, it can be accepted and can be the basis for conviction.

15) On this test also, the prosecution evidence is not worth reliance. Both these two witnesses namely, PW-9 Thanvar Singh & PW-6 Niranjan have categorically stated that since first day of the incident all the villagers were suspecting the accused to be the culprit being stepmother of Ku. Bharati, that is why they were saying to the accused that she has committed the murder. In view of the above evidence, it cannot be said that extra judicial confession, if at all made, was voluntary because there was pressure on her by the villagers.

16) Moreover, PW-9 Thanvar Singh has stated that Shail made extra judicial confession on 16-4-2000 whereas as per the record, Shail was arrested on 14-4-2000. On her discloser (Ex.P/10) the towel, which was used for gagging the mouth of the deceased, was recovered on 14-4-2000. Under these circumstances where there was no occasion for the accused to make extra judicial confession without presence of police on 16-4-2000. Recovery of towel

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is also cooked up evidence for the reason that the memorandum (Ex.P/10) was given by the accused. The towel said to have been recovered from the room of the accused lying on the sofa and that too on 14-4-2000 whereas from the date of incident number of persons were moving in the room. It is not a case that towel was in a concealed possession and the same was only in the knowledge of the accused. Therefore, this recovery also does not inspire confidence of the Court.

17) As far as last seen theory is concerned, it is admitted position that as per the site plan prepared by the Investigating Officer as well as Halka Patwari that the body was recovered from the room, which was being used by Dhaleshwari. As per the prosecution case, the accused made extra judicial confession in which she stated that she committed the murder of Ku. Bharati by gagging a towel in her mouth and thereafter pressed her neck. How injuries No.5, 6 & 7 (abrasions), sustained by Ku. Bharati on her private parts is not clear. Therefore, the last seen theory also does not inspire confidence of the Court because there were two marriages and number of persons were moving in the house. Moreover, the body was found in the room, which was being used by Dhaleshwari. Therefore, it cannot be said that Ku. Bharati was with the accused only and there was no possibility of her being in company of some other persons.

18) In view of the above, we are of the considered opinion that the circumstantial evidence adduced by the prosecution in order to connect the accused in the crime in question has not stood up to the test laid down by the Apex Court in the matter of resting conviction based on the circumstantial evidence i.e. in order to rest the conviction, the circumstantial evidence must be cogent & clear, and irresistible conclusion must have been drawn, on the basis

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Gowri	of which it can be said that the accused is the only author of the crime in question and there is no possibility of coming any third person to commit the crime. 19) In the result, the appeal succeeds. Conviction & sentence imposed upon the accused/appellant under Section 302 of the Indian Penal Code are set aside; she is acquitted of the said charge. She be set at liberty forthwith, if not required in any other case. **Sd/-** **L.C. Bhadoo** **Judge**	**Sd/-** **Sunil Kumar Sinha** **Judge**